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Academics Making a Difference: Prosecutor Disclosure Obligations in Criminal Cases

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Ellen Yaroshefsky, *Foreword* to Symposium, *New Perspectives on Brady and Other Disclosure Obligations: What Really Works?*, 31 **Cardozo L. Rev.** 1943 (June 2010), *available at* SSRN.

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For years, Ellen Yaroshefsky of Cardozo Law School has been one of the leading scholars in the U.S. on issues related to legal ethics and the criminal defense system. In an era in which legal scholars are sometimes accused of writing theoretical works that are of little practical use, she has a track record of successful applied scholarship. Her voice has made a difference. For example, after working on the issue in New York, Ellen Yaroshefsky and Fordham Professor Bruce Green signed the report from the ABA Committee on Ethics, Gideon and Professionalism that recommended that ABA the Section on Criminal Justice sponsor a resolution in the ABA House of Delegates to add Rules of Professional Conduct 3.8(g) and (h). The resulting resolution, which was supported by a number of entities, was adopted. As a result, ABA Model Rule 3.8 now imposes disclosure duties on prosecutors who know of "new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted" and requires prosecutors to "seek to remedy the conviction" if they have clear and convincing evidence that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit. This ABA Model Rule change has led to a number of concrete state rule changes that impose new duties on prosecutors. As of January 2011, two states had adopted the proposed revisions to Rule 3.8, three states had adopted a modified version of Rules 3.8(g) and (h), and eleven jurisdictions were studying the ABA resolution and report. I predict that many of these jurisdictions are likely to adopt Rules 3.8(g) and (h), which is what the relevant entity in my home state of Pennsylvania recently recommended.

The 2010 Cardozo Symposium entitled "New Perspectives on Brady and Other Disclosure Obligations: What Really Works" is important reading for all lawyers – regardless of specialty or country – because we all have an interest in participating in a legal system that has a robust rule of law. Corruption or even misunderstandings about prosecutor conduct, including disclosure duties, can undermine public confidence and also the confidence of the legal profession in our legal system. This is a broader problem than one might realize. For example, in 2010, the International Bar Association, the Organization of Economic Cooperation and Development, and the United Nations Office on Drugs and Crime jointly developed a survey on "Risks and Threats of Corruption in the Legal Profession." The Survey was distributed to IBA member and 642 professionals from 95 countries responded. Although the Survey cautioned that its results might not be statistically significant, it also stated that the Survey represented "a first attempt to shed light" on issues that included the legal profession's perception of corruption in their own jurisdiction. Nearly half of the respondents stated that corruption was an issue in the legal profession in their own jurisdiction. Approximately 20% of the responding lawyers from the U.S. and

Canada thought corruption was an issue in the legal profession in their country. (This contrasts with approximately 15% of lawyers in Australasia, 32% of lawyers in the EU, and 90% of lawyers in the Commonwealth of Independent States.)

As a member of the U.S. legal profession, I found the survey results quite disheartening since they showed that lawyers in more than fifteen jurisdictions found that corruption was less of a problem for their legal profession than did U.S. lawyers. (Lawyers from 20 jurisdictions (including the U.K.) believed that corruption was more of a problem than did U.S. lawyers.) The Cardozo Symposium is important because it represents a positive effort to remedy problems in our legal system that might undermine societal confidence in the rule of law. All members of society, but especially the legal profession, have a large stake in this effort. So even if you don't read anything else in the entire Symposium, you owe it to yourself to read Professor Yaroshefsky's twelve page Foreword which summarizes the Symposium contributions.

Professor Yaroshefsky's Foreword begins by pointing to several high-publicity cases that involved the failure to disclose fundamental exculpatory evidence to the defense, including the reversal of the prosecution of Senator Ted Stevens that led the U.S. Department of Justice (DOJ) to undertake an examination of its disclosure policies and practices. The Symposium was based on the premise that there is a lack of clarity about the meaning of the U.S. constitutional "Brady obligation," which requires prosecutors to disclose exculpatory evidence to the defense counsel and a lack of clarity about the timing requirements for this disclosure obligation. The Foreword observed that prosecutors and defense counsel also disagree on the scope of the problem and that empirical research is difficult. Accordingly, the Symposium's goal was to shift the conversation from individual, blame-based rhetoric to one of working in concert to examine systemic change that would improve the disclosure process.

As the Foreword explains, seven organizations co-sponsored the Symposium, including three law schools, the National District Attorneys' Association, the National Association of Criminal Defense Lawyers, the ABA, and the Justice Center of the New York County Lawyers' Association. The sponsors sought the attendance and participation of prosecutors, judges, defense lawyers, and academics from throughout the country. The organizers asked the speakers to offer ideas from their discipline and practice areas on how to improve–and what lessons could be adapted to–the disclosure processes of the criminal justice system. Professor Yaroshefsky's Foreword summarizes the remarks by the six morning speakers and four afternoon speakers, who were a diverse, interdisciplinary group that included two district attorneys, one defense counsel, and experts in medical errors, cognitive psychology, information management in police practices, organizational and psychology assessment tools, institutional design, and education and metrics of evaluation. Although the Foreword explains that both the morning and the afternoon session were following by responses from a panel that included prosecutors, defense counsel and judges, it did not summarize those panel remarks. It did, however, summarize – albeit briefly – the remarks of Manhattan District Attorney-elect Cyrus Vance and the reports of the six Working Groups, which sought to develop "best practices" on the topics of prosecutorial disclosure obligations and practices, the disclosure process, training and supervision, systems and culture, internal regulation, and external regulation. Finally, the Foreword presents the highlights of thoughtful articles by Rachel E. Barkow, Alafair S. Burke, Lawton Cummings, Bruce Green, Daniel S. Medwed, and Barry Scheck. And you get all of this in only twelve pages! Even if you do not study criminal justice issues, you should read the Foreword in order to develop a better appreciation of issues that are critical to the rule of law and to see additional examples of how systemic, ex-ante approaches (analogous to those described by other Jotwell contributors) can be used when designing legal systems and rules.

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